IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

KHEM RAJ & ORS. V. THE STATE OF RAJASTHAN

D. B. CRIMINAL APPEAL NO. 386/85

Under Section 374, Cr.P.C.,against the Judgment dated 29-09-1986, passed by the learned Additional Sessions Judge No.1,Udaipur,in Sessions Case No.77/83.

DATE OF JUDGMENT :::: 19.09.2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATHBHANDARI

Mr.Anand Purohit}
Mr.Pappu Songara} for Appellant (s).
Mr. J.P.S.Choudhary, Public Prosecutor.

BY THE COURT:-[PER HON'BLE MR.BHANDARI, J.]

Appellants have preferred this appeal against the judgment dated 29.09.86 passed by the Additional Sessions Judge No.1, Udaipur in Sessions Case No.77/83.

The prosecution case was started by lodging First Information Report by deceased Smt. Panni Devi on 16.08.83 at 8.00 P.M. with Police Station Gogunda. In the oral report, Smt. Panni Devi stated that she was going towards her fields to collect buffaloes by that time Khemraj and Bheru Lal S/o Bhulaji created a temporary wall of stones on the way, the same was protested by her. She asked them as to why they are placing stones on the way and asked them to allow her to go in the field and not to place stones. On such protest, accused Khemraj gave a blow to her by lathi and thereafter gave blow on her chest by an umbrella and thrown stones on her. Chain Ram and Devkishan came at the scene of occurrence to get her relieved. On account of blow by a lathi, she fell down but later on, she went to her place and now reporting this matter to the police.

Pursuant to the said report, the First Information Report under Sections 323 and 504 IPC was registered. After lodging the First Information Report complainant Smt. Panni Devi died on 23.08.83, while she was under treatment. Thereafter, case under Section 302 IPC was registered bearing FIR No.576/83. After registration of FIR, usual investigation was conducted and thereupon challan was filed before the Munsiff and Chief Judicial Magistrate, Gogunda.

The case was committed to the Sessions Judge, Udaipur, from where the same was transferred to the trial court.

The learned trial court framed charges against the accused appellants vide its order dated 19.12.83. Against the accused Khemraj, charge under Section 302 IPC, was framed whereas accused Bheru Lal was charged under Section 302/34 IPC and remaining accused were charged under Section 302/114 IPC. All the accused denied charge and claimed trial.

At the trial, 15 witnesses were produced by the prosecution and 14 documents were exhibited. In defence, no witness was produced, however, three documents were exhibited. Statement of accused appellants were recorded under Section 313 Cr.P.C.

The trial court acquitted accused Bhagwan Lal, Shanti Lal, Fateh Lal, Champa Lal and Smt. Amarti Bai. Accused Khemraj was convicted under Section 302 whereas accused Bheru Lal was convicted under Section 302/34 IPC. Both the accused, thereafter, sentenced to life imprisonment along with penalty of Rs.100 each, in default of payment, to further undergo two months rigorous imprisonment.

Learned counsel appearing for the appellant assailed the judgment of the trial court mainly on the ground that prosecution could not prove its case against both the accused appellants under Section 302 and 302/34 IPC, yet, an order of conviction was passed. It was further urged that cross case was firstly registered at the instance of Bheru Lal who had sustained injuries. After recording perverse finding in regard to case of private defence, accused appellants were convicted and sentenced. It was lastly urged that even the, injuries sustained by deceased Smt. Panni Devi were simple in nature thus, ignoring this aspect, order of conviction under Section 302 IPC has been passed. It was thus prayed that the judgment of the trial court be set aside.

Per contra, learned Public Prosecutor supported the judgment of the learned trial court and urged that deceased Panni Devi died due to head injury sustained by her. The said injury was caused by Khemraj and Bheru Lal who came with the common intention, thus both the accused were rightly being convicted by the trial court. It was further stated that no case of self defence was made out, in view of the evidence submitted by the parties thus findings recorded by the trial court cannot be said to be perversed so as to call for interference by the appellate court. Learned

Public Prosecutor thus prayed for rejection of the appeal preferred by the appellants.

We have considered the rival submissions of the counsel for the parties and have carefully scanned the record.

The prosecution case rests mainly on the evidence of eye-witnesses. Out of which the statement of P.W. 12 Jadav Bai, P.W.3 Dev Kishan and P.W. 4 Chain Ram are quite material. Out of three eye-witnesses name of Jadav Bai has not been disclosed in the FIR by Smt. Panni Bai Complainant. Deceased Panni Bai had not stated that she was going towards their agricultural field alongwith Smt. Jadav Bai. Yet prosecution presented Smt. Jadav Bai as eye-witness. On perusal of her court statement it reveals that when she along with deceased Smt. Panni Devi were going to her agricultural field then on the way accused Khemraj and Behru Lal were seen. Both the accused were placing stones on the way to obstruct it. On being protested by deceased Panni Bai, accused Khemraj threatened her Panni Bai stated that she is going to collect her buffaloes, Khemraj refused to allow them to go. Bheru Lal then catch hold of the neck of Panni Bai, thereafter Khemraj went inside the house of Nand Ram and brought a lathi and hit Smt. Panni

Bai by the lathi. Witness further stated that Bheru Lal gave blow to deceased Panni Bai by an umbrella. In her cross examination, she showed ignorance about the fact as to whether accused Khemraj intent to drain water lying in his field. When she was confronted with her police statement showing contradiction then certain lines shown were refused to be belonging to her. So far as the place of occurrence is concerned the same is shown as two places. One in the field and other in front of Nand Ram's house. If her statements are seen then it clearly shows that it does not corroborate the story indicated in the FIR and otherwise contains contradiction not only in regard to the attribution of injuries by two accused namely Khemraj and Bheru Lal but even contradiction in regard to the place of occurrence however, all this contradictions were ignored by the trial court . More so, when said witness was not named in the FIR to state that she was accompanying deceased Panni Bai.

P.W.3 Dev Kishan in his statement stated that when he reached to the place of occurrence then found that accused Khem Raj and Behru Lal were fighting with Smt. Panni Bai and Smt. Jadav Bai. He further stated that he is not in know of the fact that as to whether stone thrown by Bheru Lal hit Panni Devi or not. In his statement injuries are

assigned to accused Khemraj. In his cross examination, witness admitted that Khemraj and Bhanwar Lal are having their fields adjoining to each other. It was further admitted that Bheru Lal also sustained injuries but he is not in know how the said injury was caused. Witness further admitted that he is in relation with Bhanwar Lal and Khemraj. So far as place of occurrence is concerned, witness stated that the entire occurrence did not take place in field of Khemraj however, it was admitted that occurrence took on account of dispute of 'Bara'.

P.W. 4 Chain Ram in his statement repeated the same story but in his cross examination this witness admitted that he had not seen initial incident as he was inside the house and further shown his ignorance that Bheru Lal sustained any injuries. However, it was admitted that he had heard about fighting. Witness then stated that he had not seen anybody else then Khemraj beating deceased. Thus, this witness has not supported the prosecution case entirely rather other than Khemraj he has not seen others participating in fighting between two groups.

P.W. 5 Kalu Lal, P.W 8 Hari Ram, P.W. 10 Kuka Lal and P.W. 11 Tola Ram have again produced as eye-witnness and

in their statement, they have supported the prosecution case. However, their presence has not been shown in the FIR thus, the presence being doubtful, no reliance can be placed on their statements.

The statement of P.W. 14 Dr.V.K.Malhotra is quite material to judge the prosecution case. Dr. Malhotra in his statement stated that out of five injuries sustained by deceased Smt. Panni Bai, injuries Nos. 2 to 5 in Injury Report were found to be simple in nature and so far as injury No.1 is concerned, the opinion on the same was kept reserved. In his opinion, cause of death was comma out of head injury. In his opinion injury No.1 was sufficient to cause death. The witness however, admitted that even injury No.1 was showing swelling, and during the external examination no wound was found, even in X-ray report no fracture was deducted out of first injury. Witness further admitted that one cannot die immediately after receipt of first injury. The witness lastly admitted that "Comma" was direct cause of death and further stated that injury No.1 was eminently not found dangerous to life. It was likely to cause death. The said witness could not express his opinion as to whether deceased Smt. Panni was in need of immediate surgery. It was further stated that deceased Smt. Panni must have

remained under deep unconsciousness because the stage of comma comes later on. The prosecution has not shown as to when deceased Smt. Panni went in comma rather available facts shows that she was not in comma after sustaining injuries and even trial court expressed its opinion that deceased Smt. Panni may not have remained in comma though said opinion goes against the medical evidence submitted by the prosecution.

The perusal of the statement of eye-witnesses shows contradiction in their statement. Apart from the fact that statement of one witness has not entirely corroborated by another witness. It is also evident that out of three material eye-witness presence of P.W 12 Jadav Bai has not even shown in the FIR. More so the incident was reported to the police by none-else but by deceased Smt. Panni herself. The learned trial court has not taken into consideration this aspect of the matter while placing reliance on the statement of Jadav Bai. Even if her statement is considered showing her presence at the time of occurrence then in the examination-in-chief the said witness has stated that first accused Behru Lal catch hold of the neck of deceased Smt. Panni to put her down, again Behru Lal thrown one stone hitting at the abdominal of deceased Smt. Panni Bai.

According to the statement of said witness, Khemraj brought lathi from the house of Nandram but this story has not been narrated in the FIR. Even in her statements place of occurrence is shown to be one that is in the field. Though, later on she improved her statement in second version and stated that injury by lathi was caused to deceased in front of Nandram's house where she was present along with her mother-in-law. This again is not the story narrated in the FIR. Apart from the fact that when witness was confronted through her police statement Ex.D-1 it was found that as per her police statement injury from lathi was caused on the way of field therefore, her statement is not confirming the story given in the FIR and even in her own police statement rather their exist self contradiction.

Considering the statement of P.W. 3 Dev Kishan we find that he has not corroborated the story given by Smt. Jadav Bai because in his examination-in-chief it was stated that the place of occurrence was first near Bhanwar Lal's "Bara" where Khemraj accused gave one blow by lathi to Smt. Panni bai and second on her abdominal. Allegation against Bheru Lal was not specifically given for causing any injury. The witness further stated that the Chaina Ram catch hold of Khemraj to stop the fight but Khemraj released him and

brought an umbrella from the house of Nandram and gave a blow on the right side of the abdominal of deceased Smt. Panni. This part of statement is not corroborated by the other eye-witnesses specifically in the statement of Smt. Jadav Bai's. According to the statement of Smt. Jadav Bai Khemraj brought a lathi from the house of Nand Ram whereas other eye-witness has stated that he brought an umbrella from the house of Nand Ram. Witness P.W. 3 DevKishan has not corroborated the initial part of story as stated by Smt. Jadav Bai to the effect that Khemraj first catch hold of deceased neck who then fell down, therefore, different stories have been narrated by the eye-witnesses which has been even reflected from the fact that Smt. Jadav Bai put certain allegation against Behru Lal whereas P.W.3 Devkishan shown ignorance about causing any injury by Bheru Lal to deceased Smt. Panni Bai. The said witness further improved his statement by stating that place of occurrence changed during the course of fight and at that stage Khemraj brought a lathi from the house of Nand Ram however, he deny the fact that said lathi was given by Nand Ram wife to Khemraj.

It is otherwise a fact that deceased Smt. Panni had not died immediately after the occurrence but remain in hospital

for few days. Thus, we cannot ignore the fact that Smt. Panni may have died due to non-availability of proper treatment because fact available on record shows that after occurrence at about 2.00 P.M. On 16.08.83 Smt. Panni herself went to police station Gogunda at 8.00 P.M. Along with her son Bhimshanker to lodge FIR and, thereafter she was referred to hospital for medical examination. Thus even after sustaining injuries, the deceased had not felt it necessary to be hospitalized immediately. The trial court has already recorded finding that deceased Smt. Panni was in a position to talk therefore a further fact is over ruled that she remained in comma immediately after hospitalized rather this is not even the case of prosecution. P.W. 14 Dr. Malhotra also stated that Smt. Panni may have remain in deep unconsciousness thus, even medical evidence does not show that Smt. Panni remain in comma immediately after occurrence. In the cross examination P.W. 14 Dr.Malhotra admitted that the injury may not be of the nature causing immediate death thus it becomes clear that if it was not such an injury then firstly injury was curable and secondly accused were not having intention to kill Smt. Panni otherwise they would not have left Smt. Panni after giving only one hit on her head. However, trial court again ignored all these aspects of matter except recording the finding that

deceased Smt. Panni may not have died due to comma.

The matter is further having another aspect inasmuch as accused Behru Lal lodge an FIR on 16.08.83 at 4.00 P.M. at least four house earlier to the report lodged by deceased Smt. Panni. In the said FIR Ex.D-2 accused Behru Lal stated that when he was tried to release water lying in his field due to rain then Bhanwar Lal, Bhimshanker, Smt. Panni etc. came in a group and started beating him. Out of those beating he sustained injury on the chest as well as on right hand. Injury report Ex.D-3 was also produced to support his story. The learned trial court disbelieved this story on the following grounds:-

[1] In the evidence, presence of Bhanwar Lal and Bhimshanker has not been shown by any witness. [2] The story of Bheru Lal regarding release of water from field has not been supported by any witness though in the statement of Jadav Bai P.W 12 shown ignorance on the fact of release of water by Bheu Lal. [3] Bheru Lal lodged an FIR at 4.00 P.M. on 16.08.83 whereas deceased Smt.Panni lodged FIR at 8.00 P.M. on 16.08.83 yet Incharge of Police Station made an endorsement and refer Smt. Panni Bai for treatment to the hospital whereas no such advice for treatment was suggested on the report of Behru Lal. Thus it was presumed

that Behru Lal may not have received any injury. Ignoring the statement of eyewitness who stated that even Behru Lal sustained injuries, out of which blood was coming out. [4] Deceased Smt. Panni was examined by the Dr. Malhotra at 11.15 P.M. on 16.08.83 whereas Behru Lal was examined by doctors on next day i.e. on 17.08.83 [5] and last reason is that Behru Lal shown place of occurrence to be in the field to save himself however, according to trial court the story as stated by Bheru Lal cannot be believed and thereby it cannot be considered to be a case of self defence.

Considering the aspect of self defence we are of the opinion that finding recorded by the trial court cannot be accepted entirely because the said finding has been recorded without considering the statement of eyewitness produced by prosecution itself. P.W 3 Devkishan in his cross examination admitted that Behru Lal sustained injury but he is not in know of the fact as to who caused that injury but blood was coming out from that injury. Said witness even admitted that he had seen the injury of Bheru Lal.

In the aforesaid circumstances, the finding recorded by the trial court to say that Behru Lal's story cannot be accepted, is based on perversed finding. It is otherwise a fact that Bheru Lal first made a report to the police station

Gogunda thus it cannot be said that he had created a story after FIR of deceased to save himself. More specifically he is not alleged to be main accused and otherwise prosecution has not projected Behru Lal's FIR to be false. Thus this part of the story cannot be disbelieved for the reasons given by the trial court.

Looking to the discussions made above it is evident that there are contradiction in the prosecution story as to who assign which injury but so far as the head injury is concerned mainly it has been stated that the same was caused by Khemraj. All other injuries being simple thus do not remain of much relevance. Concentrating on the head injury, we find that no fracture was found in the X-ray report and even as per the opinion of the doctors deceased Smt. Panni had not immediately died after receipt of the said injury. The cause of death has shown to be comma due to head injury but again medical evidence could not show that when Smt. Panni went in comma. On a specific question raised to P.W. 14 Dr. V.K.Malhotra shown his ignorance as to whether Smt. Panni was in need of surgery or not rather it was stated that many injuries may not give cause to immediate death. In the present case, even after sustaining injury, Smt. Panni travel to village Gogunda to make a report even after six hours of

the occurrence she was not reported to have lost her consciousness rather at the time of hospitalization she was talking to the family members and it has not been submitted that Smt. Panni remain in comma for few days, therefore, we cannot ignore the possibilities that Smt. Panni was not properly given treatment in the hospital which may be apparently for the reason that no external injury was deducted and even in X-ray report no fracture was found on the head thus for these reason a proper treatment may not have been given and deceased died after few days of her hospitalization then it is not safe to arrive at a conclusion that deceased Smt. Panni died only for the reason given by the prosecution. It was further a fact that their exist not only contradiction in the statement of eyewitnesses but it is again a fact that prosecution's initial story given in the FIR is not corroborated in the same manner as is being stated. There exist lot of improvement therein and in those circumstances criminal jurisprudence in India does not suggest to convict a person in doubtful situation for commission of a crime. At the best it can be a case falling under Sections 323 IPC or 325 IPC. Even the police initially registered a case under Sections 323 and 504 IPC. Because all injuries were found simple as neither any wound nor a fracture other than swelling out of first injury was found, therefore the immediate cause of

death cannot be said to be out of first injury. Hence, it cannot be concluded that accused were having intention to kill Smt. Panni as per the story given by the prosecution. It seems that fight broken out spontaneously and the accused were not having even weapons in their hand rather as per the statement of eyewitness, in between the fight, accused Khemraj brought a lathi from Narayan ram's house therefore, it is not safe to draw conclusion that the accused were having common intention to kill Smt. Panni.

In view of the above discussion we are not in agreement with the finding recorded by the trial court thus conviction of accused under Sections 302 & 302/34 is set aside.

However accused are convicted under Section 325 IPC and 325/34 IPC and they are sentenced to the period already undergone.

In the result, the appeal of the appellants is allowed in part. According to us, the case under Section 302 IPC and 302/34 IPC is not made out in the present matter. Therefore conviction of the accused under Section 302 and 302/34 IPC can be maintained. The judgment of the learned trial court is

modified as indicated above. Since accused are on bail pursuant to the order of this court thus, they need not to surrender. Their bail bonds may be released.

(MUNISHWARNATHBHANDARI),J.(BHAGWATI PRASAD),J

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